85-1018

No. .....

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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In The

Supreme Court of the United States

October Term, 1985

—o—

SOUTHLAND NEWS CO., INC.,
a Kentucky corporation,

Petitioner,

v.

THE COUNTY OF WINNEBAGO, a body politic, and PAUL GILL, in his capacity as Clerk of Winnebago County, Illinois,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether the Winnebago County Outdoor Theater License Ordinance violates the First Amendment by requiring licensees to covenant against exhibiting motion picture films that may be constitutionally protected.

2. Whether the lower courts erred in viewing this Court's summary dismissal of *Starview Drive-in Theatre, Inc. v. Cook County,* 457 U.S. 1113 (1982), as altering the pronounced doctrines of *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975).

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THE COUNTY OF WINNEBAGO, a body politic, and PAUL GILL, in his capacity as Clerk of Winnebago County, Illinois,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 15, 1985.

—o—

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is an unpublished order rendered on August 15, 1985. A copy of the order, and the June 7, 1984 order of the district court that was adopted in its entirety by the court of appeals, are included in the Appendix as Exhibit A.

———o———

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. § 1254(1) for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. A written unpublished order was issued by that court on August 15, 1985. The petitioner filed a petition for rehearing and suggestion for rehearing *en banc*. That petition was denied on September 17, 1985. A copy of the order denying rehearing *en banc* is included in the Appendix as Exhibit B.

The record in this cause was lodged with the Clerk of the U.S. District Court for the Northern District of Illinois, Western Division, Rockford, Illinois on September 30, 1985, with the return of the mandate to that court. Although the mandate has issued, the United States Supreme Court has jurisdiction to review the decision of the United States Court of Appeals regardless of the status of the mandate. *Carr v. Zaja*, 283 U.S. 52, 53 (1931); *Aetna Casualty Co. v. Flowers*, 330 U.S. 464, 468 (1947).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the First and Fourteenth Amendments to the United States Constitution, and the Winnebago County Outdoor Theater License Ordinance, § 4-14, Article III of the Code of Ordinances of Winnebago County, are set forth in the Appendix as Exhibit C.

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STATEMENT OF THE CASE

The petitioner, Southland News Co., Inc., owns and operates two drive-in theaters in Winnebago County, Illinois. Both theaters held required licenses issued by the respondent Winnebago County, through the county clerk, respondent Paul Gill, pursuant to the provisions of § 4-14, Article III of the Code of Ordinances of Winnebago County. The Robin Theater exhibited motion picture films rated under the Motion Picture Association of America (MPAA), which films included scenes depicting frank sexual activity. The Sunset Theater exhibited motion picture films dealing frankly with nudity and sexual activity (commonly referred to as X-rated), restricting attendance at the theater to adults only. The outdoor theater licenses for each theater were to expire on April 30, 1984.

Under the Winnebago County Outdoor Drive-in Theater Ordinance, as it existed prior to April 12, 1984, parties operating outdoor movie theaters were only required to fill out an application and pay a specified fee. On April 12, 1984, however, Winnebago County amended the ordinance governing the issuance of such licenses. A copy of the amended ordinance to the outdoor theater license re-

quirements under § 4-14, Article III of the Code of Ordinances of Winnebago County is included in Exhibit C of the Appendix. Under the amended ordinance, issuance of a license was expressly conditioned upon the applicant for any new or renewal license executing a written covenant to:

> [R]efrain or desist from exhibiting any motion picture or film presentation viewable from any private residence or any public street or walkway which contains any scene or scenes depicting sexual intercourse, masturbation, oral copulation, erect male genetalia or male ejaculation;
>
> [R]efrain or desist from exhibiting any motion picture or film presentation viewable from any private residence which contains any scene or scenes depicting the caressing or fondling of the bare female breast or bare male or female buttocks, anus or genitals.

The legislative history of the ordinance was presented to the district court by submission of county board minutes and subcommittee minutes relating to the enactment of the ordinance amendment. The resolution adopting the amendment provided that it was:

> [I]n the best interest of the health, safety, merals and welfare of the residents of the County of Winnebago and current and future residents of the County whose homes are in close proximity to existing or future Outdoor Drive-In Theaters.

Subcommittee minutes reflected a meeting of its members to study the "obscenity ordinance", and their feeling that the best way of imposing the ordinance would be to "tie an agreement in with the license requirements". Comments of individual county board members reflected the concern over the content of certain films. One member noted the ordinance was designed and intended to "somehow pre-

vent them from showing movies that would show any kinds of obscene or obsence materials that will be viewed from their homes, private homes or walkways." Another member expanded further on the purpose, stating:

> I quite frankly don't care what people do in enclosures or in the privacy of their own homes, but something has to be done to prohibit the viewing of objectionable materials in public from people who don't want to watch them and don't want to be put into the position of having to adjust their private lives because someone feels it is their constitutional right to view what the majority would feel to be obscene.

On April 19, 1984, the petitioner made application to the respondent Gill for licenses for its two theaters, submitting the required fees but refusing to execute the written covenants required by the ordinance amendment. The respondent refused to issue licenses to the petitioner, despite verbal and written demands from petitioner to issue the licenses and refrain from enforcement of the required written covenants under the ordinance. After April 30, 1984, absent the required execution of written covenants, petitioner would be prohibited from the exhibition of motion picture films at both of its theaters, or would be subject to arrest for operation of its theaters without the required licenses.

On April 24, 1984, petitioner filed its complaint pursuant to 42 U.S.C. § 1983, attacking the constitutional validity of the amended ordinance and seeking injunctive and money damage relief against respondents. Petitioner sought a temporary restraining order (TRO), and preliminary and permanent injunction to require respondents to issue licenses to the petitioner and refrain them from at-

tempting further prior restraints on the petitioner's operation of its theaters.

Respondents filed a motion to dismiss the TRO request, asserting that the matters sought to be reviewed by the court were the subject of substantially the same ordinance, pleadings, and assertions addressed to *People ex rel Carey v. Starview Drive-in Theatre Inc.*, 100 Ill.App. 3d 624, 427 N.E.2d 201 (1981), appeal dismissed for want of a substantial federal question, 457 U.S. 1113 (1982).

United States District Judge Milton Shadur presided at the April 30, 1984 hearing on petitioner's request for a TRO. At the hearing, petitioner presented evidence to the court in the form of an affidavit and testimony from employees of Kerasotes Theaters, a Springfield-based corporation which owned and operated an outdoor drive-in theater in Winnebago County, Illinois. That evidence included assertions that the Kerasotes Theaters showed motion picture films rated by the MPAA, and that R-rated motion picture films contained sexual themes and scenes that would fall within the descriptions contained in the licensing ordinance covenants. Judge Shadur rejected the respondent's contentions regarding the *Starview* decision, and found *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), to be the controlling authority. District Judge Shadur granted the TRO, allowing petitioner to operate its theaters without renewed licenses. The written TRO entered by Judge Shadur on May 3, 1984, is included in the Appendix as Exhibit D.

United States District Court Judge Stanley Roszkowski presided over further proceedings in the case, and the TRO was expanded by agreement until a hearing on the

request for a preliminary injunction and on respondent's motion to dissolve the TRO. At Judge Roszkowski's request, the respondents provided documents demonstrating the legislative history of the amendment to the ordinance. Petitioner responded to the *Starview* issue and provided the court with a copy of the jurisdictional statement filed with the United States Supreme Court in *Starview*. The petitioner asserted that *Starview* was not a ruling on the merits, and was not controlling authority in considering the request for preliminary injunctive relief.

On June 8, 1984, Judge Roszkowski entered an order denying the petitioner's request for a preliminary injunction and granting the respondent's motion to dissolve the TRO. In rejecting the petitioner's position on the *Starview* case, Judge Roszkowski noted that under *Hicks v. Miranda,* 422 U.S. 332 (1975), as an inferior court he was required to treat the United States Supreme Court dismissal of the *Starview* case for want of a substantial federal question as a decision on the merits, and binding authority as to the issues presented in this case. He expressed concern about the issue, however, concluding:

> It is not without some reluctance that the court concludes it is bound by the summary disposition in *Starview*. In the view of this court, substantial doubt remains concerning Starview's validity in light of *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975) and *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976). While the Supreme Court is free to disregard its summary actions, *Metromedia Inc. v. City of San Diego,* 453 U.S. 490, 500 (1981), however, this court is not.

Southland News appealed to the United States Court of Appeals for the Seventh Circuit. In its brief to the

Seventh Circuit, petitioner asserted the lower court erred in its assessment of the weight and impact to be afforded to United States Supreme Court cases involving summary dispositions with cases receiving full plenary review by the United States Supreme Court. Petitioner again raised its claim that the controlling authority was *Erznoznik*, and that under the principles of *Erznoznik* the ordinance amendment violated its constitutional rights and resulted in the imposition of a prior restraint.

On August 15, 1985, in an unpublished order, the Seventh Circuit Court of Appeals affirmed the district court ruling, incorporating Judge Roszkowski's order in its entirety, and concluding:

> Upon review of the briefs, pertinent authorities, and the record we have reached the same conclusion as the district court that *Starview's* summary dismissal binds us even though we have some doubt as to its consistency with several Supreme Court plenary decisions issued before *Starview*.

Southland timely filed a petition for rehearing and suggestion for rehearing *en banc*, which was denied by the court of appeals on September 17, 1985.

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REASONS FOR GRANTING THE WRIT

I.

THE WINNEBAGO COUNTY AMENDED OUTDOOR THEATER LICENSE ORDINANCE, ON ITS FACE AND AS APPLIED, VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES UNDER THE DIRECT HOLDING OF ERZNOZNIK V. CITY OF JACKSONVILLE, 422 U.S. 205 (1975).

Winnebago County has effected a scheme of censorship aimed directly at petitioner's outdoor theaters, and also affecting the only other outdoor theater in the county. The censorship is accomplished by first forcing a theater operator to promise that he will not show motion picture films that contain specified sexual scenes, and then by the county revoking or suspending a theater license issued to the operator when a film with the described scenes can be seen outside the theater premises. Both the requirement of the written covenant, and the prohibitory language of the ordinance, call into play significant First Amendment interests justifying this court's consideration of plenary review.

Petitioner submits that the controlling authority for review of theater license ordinances is this court's decision in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). There, a Jacksonville, Florida ordinance prohibited the showing of films containing nudity at a drive-in theater whose screen was visible from a public street or place. The argued justification for such an ordinance was the protection of citizens from unwilling exposure to what they might deem offensive material. In finding the ordinance unconstitutional, this Court stated:

> The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' Rowan v. Post Office Dept., *supra*, 397 U.S. at 736, 90 S.Ct. at 1490. Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'

Erznoznik v. City of Jacksonville, 422 U.S. at 210. The Court noted that a drive-in screen in and of itself was not so obtrusive that a person could not avert the view simply by looking the other way. 422 U.S. at 212. The Court concluded that the ordinance was constitutionally overbroad because its prohibitions regarding nudity were in no way tied to context or pervasiveness. 422 U.S. at 212. Lower courts have recognized and applied the *Erznoznik* principles in invalidating license ordinances that tie licensing or revocation or suspension to standards other than the constitutional guidelines for obscenity set forth by this Court in *Miller v. California,* 413 U.S. 15 (1973). See *People v. Valley Cinemas, Inc.,* 194 Cal.Rptr. 859 (Cal. App.3d Dist., 1983); *Northeast Theatre Corp. v. Jordan,* 445 F.Supp. 744 (D.Mass., 1978); *E & B Enterprises v. City of University Park,* 449 F.Supp. 695 (N.D.Tex., 1977). This Court last term reaffirmed the principle that material that does not offend each element of the tripartite test for

obscenity enjoys constitutional protection. *Brockett v. Spokane Arcades, Inc.*, — U.S. —, 105 S.Ct. 2794 (1985).

This Court has viewed the *Erznoznik* doctrine as being applicable where the deterrent effect of legislation on legitimate expression is real and substantial. If the effect of the legislation is to suppress protected speech, it is clearly in violation of the First Amendment. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Where an ordinance would ban the exhibition of a film on the basis of a single scene, notwithstanding the constitutionally protected nature of the film, such an ordinance would be invalid. 427 U.S. at 71, n.35.

In the present case, the Winnebago County Ordinance under review requires the exhibitor to covenant that he will not exhibit certain motion picture films, even if they enjoy First Amendment protection, and further, imposes the potential of license and penal sanctions if such protected materials are shown. Thus, Winnebago County has accomplished a system of prior restraint under circumstances which have been long condemned by this Court. *Southeastern Promotions, Ltd. v. Conrad*, 422 U.S. 546 (1975); *Freedman v. Maryland*, 380 U.S. 51 (1965).

The district court found that the legislative intent behind the ordinance was to prohibit the showing of sexually explicit films at the petitioner's Sunset Drive-in Theater, regardless of whether or not those films were obscene. In that history it was patent that Winnebago County officials deemed the films being shown at that theater unacceptable and wanted to restrain their exhibition through licensing procedures because of the dissatisfaction with criminal prosecutions.

The burden to be applied to the government to justify the ordinance in this case is that of a compelling governmental interest because of the First Amendment issues involved. Indeed, there is no presumption of validity or legitimacy to be attached to this ordinance. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 77 (Blackmun, J. concurring, 1981). The respondents have never tendered any justification in support of the outdoor drive-in theater license ordinance.

It is submitted that the question of the constitutionality of such an ordinance is of national interest, as opposed to local interest. The failure of the courts below to adhere to the express doctrines pronounced by this Court in *Erznoznik* and later cases cannot be ignored. Petitioner's request for certiorari review should be granted.

II.

THE LOWER FEDERAL COURTS ERRONEOUSLY AFFORDED CONTROLLING PRECEDENTIAL WEIGHT TO SUMMARY DISMISSAL OF AN APPEAL FROM AN ILLINOIS APPELLATE COURT DECISION, WHEN PROPER CONTROLLING DECISIONS AFTER PLENARY REVIEW BY THIS COURT EXISTED.

The present case presents an opportunity for this Court to address a recurring problem regarding the handling of this Court's appellate jurisdiction by decisions involving summary action. In the present case, an outdoor theater license ordinance similar to the one under review had been held facially constitutional in factual circumstances readily distinguishable from the present case. *People ex rel Carey v. Starview Drive-in Theatre, Inc.*,

100 Ill.App.3d 624, 427 N.E.2d 201 (1981). The theater invoked this Court's appellate jurisdiction by the filing of a jurisdictional statement, and this Court dismissed the appeal for want of a substantial federal question. *Starview Drive-in Theatre, Inc. v. Cook County, et al*, 457 U.S. 1113 (1982).

In the lower federal courts, the respondents have contended that the summary action of this Court in the *Starview* case is controlling and binding precedent for the proposition that the Winnebago County Outdoor Theater License Ordinance is constitutionally valid. That argument, however, ignores the required analysis of a lower court to limit the application of summary decisions of this Court to the narrowest possible grounds, and especially to not read a summary decision as renouncing a doctrine that is the product of a full opinion of this Court. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

In an effort to aid the lower court in conducting a proper analysis of this issue, the petitioner submitted the jurisdictional statement from the *Starview* action in this Court. A review of that jurisdictional statement discloses that the defendant in that case was the theater operator who had applied for and received a license and executed the covenants required by the ordinance. The action was limited to raising a question on the facial validity of the ordinance and not on the ordinance as applied. No effort was made by the lower court in *Starview* to examine the legislative history of the ordinance to determine whether or not it was "content neutral" and could therefore be justified as a reasonable time, place and manner regulation.

In contrast, petitioner Southland News Co., Inc. is the owner and operator of two drive-in theaters who applied for and was denied two theater licenses after refusing to execute restrictive covenants that would have prevented the exhibition of motion picture films containing scenes of sexual explicitness and sexual nudity. The covenants were required by an amended outdoor theater license ordinance that in its legislative history, as found by the district court, was not content neutral, and in fact, was designed to serve as a prior restraint against the exhibition of motion picture films deemed unacceptable by county government. Clearly, the *Erznoznik* doctrine under the First Amendment, as well as the *Freedman* pronouncements against prior restraints, were controlling in this case. Elevating the *Starview* summary dismissal to full opinion status cannot and should not be tolerated.

Federal district judge Shadur easily distinguished *Starview* on the facts in granting the petitioner a temporary restraining order. That TRO was based on Judge Shadur's recognition of *Erznoznik* as the controlling authority.

Petitioner submits that the failure to afford proper controlling weight to the plenary decisions of this Court is of great importance and accordingly, a review of this petition for certiorari is necessary and proper.

———o———

CONCLUSION

In the unpublished order. the Seventh Circuit Court of Appeals expressed the same reluctance that had been expressed by the district court regarding the continuing validity of the "merits" of *People ex rel Carey v. Starview Drive-in Theatre, Inc.*, 100 Ill.App.3d 624, 427 N.E.2d 201 (1981), appeal dismissed for want of a substantial federal question, 457 U.S. 1113 (1982), in the face of the express doctrines of *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) and other plenary decisions of this Court. Nevertheless, those courts held themselves bound by *Starview*. It is submitted that the result is incongruent and illogical. Certiorari should be granted.

Respectfully submitted,

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December, 1985

APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

(Argued February 26, 1985)
August 15, 1985

BEFORE

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

No. 84-C-20079

Stanley J. Roszkowski, *Judge*.

SOUTHLAND NEWS CO., INC., a Kentucky corporation, authorized to do business in the State of Illinois,

Plaintiff-Appellant,

No. 84-1988

vs.

THE COUNTY OF WINNEBAGO, a body politic, and PAUL GILL, in his capacity as Clerk of Winnebago County, Illinois,

Defendants-Appellees.

O R D E R

Plaintiff-appellant, Southland News, appeals a district court order upholding a Winnebago County ordinance that

conditions the issuance of a license to operate an outdoor movie theater on the execution of a covenant not to exhibit films viewable from any private residence or public street or walkway containing "any scene or scenes depicting sexual intercourse, masturbation, oral copulation, erect male genitalia or male ejaculation," or films viewable from any private residence containing "any scene or scenes depicting the caressing or fondling of the bare female breast or bare male or female buttocks, anus or genitals."

All parties agree that the ordinance involved is patterned to the letter after those portions of a Cook County Outdoor Movie Theater Ordinance upheld by an Illinois appellate court panel in the face of first amendment attacks. *See People v. Starview Drive-In Theatre, Inc.*, 100 Ill. App. 3d 624, 427 N.E. 2d 201 (1981). On appeal the United States Supreme Court summarily dismissed the case for lack of a substantial federal question. *See Starview Drive-In Theatre, Inc. v. Cook County*, 457 U.S. 1113 (1982) (Justice Brennan voting to note probable jurisdiction and set for oral argument). The issue is how much weight to accord this Supreme Court summary dismissal. Relying on the Court's pronouncement in *Hicks v. Miranda*, 422 U.S. 332 (1975), that a dismissal for want of a substantial federal qeustion is a decision on the merits to be heeded by inferior courts " 'unless and until the Supreme Court should instruct otherwise,' " *id.* at 344 (quoting *Port Authorities Bondholders Protective Committee v. Port of New York Authority*, 387 F.2d 259, 263 n.3 (2d Cir. 1967)), the district court upheld the Winnebago County ordinance. At the same time it expressed substantial doubt over the vitality of *Starview* in light of *Erznoznick*

v. City of Jacksonville, 422 U.S. 205 (1975) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

Upon review of the briefs, pertinent authorities, and the record we have reached the same conclusion as the district court that *Starview's* summary dismissal binds us even though we have some doubt as to its consistency with several Supreme Court plenary decisions issued before *Starview*. Judge Roszkowski's well-reasoned order thoroughly discusses the pertinent authorities and accordingly we adopt it in its entirety.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISRICT OF ILLINOIS
WESTERN DIVISION

No. 84 C 20079

SOUTHLAND NEWS CO., INC., a Kentucky Corporation, authorized to do business in the State of Illinois,

Plaintiff,

vs.

THE COUNTY OF WINNEBAGO, a body politic, PAUL GILL, in his capacity as County Clerk of Winnebago County, Illinois,

Defendants.

ORDER

Before the court are plaintiff's motion for a preliminary injunction and defendants' motion to dissolve the temporary restraining order. The court's subject matter jurisdiction is based upon 28 U.S.C. § 1343 and 28 U.S.C. § 2201. For the reasons set forth herein, plaintiff's motion for a preliminary injunction is denied and defendants' motion to dissolve the temporary restraining order is granted.

Background

The facts giving rise to the present controversy are uncontested. Plaintiff, Southland News Co., is the owner and operator of an outdoor theater located in Winnebago County, Illinois. The theater's movie screen is approximately 120′ x 70′. Movies projected on the theater's screen are visible from public streets and private residences.

In order to operate an outdoor movie theater in Winnebago County, the operator must obtain an annual county license. Prior to April 12, 1984, a party seeking to obtain a license was merely required to fill out an application and pay a certain fee. Plaintiff held such an annual license expiring on April 30, 1984.

On April 12, 1984, however, the defendant County amended the ordinance governing the issuance of such licenses. Under the amended ordinance, the issuance of such licenses is expressly conditioned upon the applicant's executing a covenant not to exhibit films depicting certain types of conduct. Specifically, the ordinance prohibits "any scenes or scenes depicting sexual intercourse, masturbation, oral copulation, erect male genitalia or male ejaculation" viewable from any private residence or any pubic street or walkway, and "any scene or scenes depicting the caressing or fondling of the bare female breast or bare male or female buttocks, anus or genitals" viewable from any private residence.

The legislative history of the subject ordinance makes it clear that the ordinance was aimed solely at the content of certain films. The resolution adopting the amended ordinance provided it was "in the best interest of the health, safety, morals and welfare of the residents of the County of Winnebago and current and future residents of of the County whose homes are in close proximity to existing or future Outdoor Drive-In Theatres." The report from the subcommittee assigned to review the proposed ordinance reflects that the members met to study "the obscenity ordinance." Moreover, the comments of individual county board members make clear that the content of certain films was the County's sole concern. Board

member Abrahamson, for example, stated the ordinance was intended to "somehow prevent them from showing movies that would show any kinds of obscene materials that will be viewed from . . . homes, private homes or walkways." Board member MacKay stated:

> I quite frankly don't care what people do in enclosures or in the privacy of their own homes, but something has to be done to prohibit the viewing of objectionable materials in public from people who don't want to watch them and don't want to be put into the position of having to adjust their private lives because someone feels it is their constitutional right to view what the majority would feel to be obscene.

No other justification was offered for the ordinance.

Plaintiff sought to renew its license under the amended ordinance, but refused to execute the required covenants. As a result, the defendant County Clerk refused to renew the plaintiff's license. Plaintiff subsequently commenced the present action.

On April 30, 1984, the court entered a temporary restraining order prohibiting the defendants from enforcing the subject ordinance. The temporary restraining order was subsequently continued by agreement of the parties. Plaintiff now seeks a preliminary injunction and defendants seek to dissolve the temporary restraining order.

Discussion

Defendants' sole argument rests upon the Supreme Court's dismissal of the appeal in *People ex rel Carey v. Starview Drive-In Theater*, 100 Ill.App.3d 624, 427 N.E. 2d 201 (1st Dist. 1981) *appeal dismissed* 457 U.S. 1113 (1982). In *Starview*, an Illinois appellate court upheld the

constitutionality of portions of a similar Cook County ordinance. The portions of the Cook County ordinance which were held to be constitutional in *Starview* form the entire basis of the Winnebago County ordinance. Thus, relying upon *Hicks v. Miranda*, 422 U.S. 332 (1975), defendants argue the dismissal of the *Starview* appeal for want of a substantial federal question settles the issues raised in the present case.

In *Hicks*, the court recognized that votes to affirm summarily and to dismiss for want of a substantial federal question are votes on the merits of a case. *Id.* at 344. Indeed, the *Hicks* court cautioned that " 'unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise.' " *Id.* (citing *Port Authorities Bondholders Protective Committee v. Port of New York Authority*, 387 F.2d 259, 263 n.3 (2nd Cir. 1967)). More recent Supreme Court pronouncements have stressed that the binding effect of such summary dispositions is limited "to the precise issues presented and necessarily decided by those actions." *Anderson v. Celebrezze*, — U.S. —, 103 S. Ct. 1564, 1567 n.5 (1983); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 183-84 [sic 182-83] (1979); and *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Plaintiff, however, contends the Supreme Court's dismissal of the *Starview* appeal is not controlling in the instant case. First, relying upon Justice Brennan's concurring opinion in *Mandel*, *id.* at 180, and various allegations contained in the *Starview* jurisdictional statement, plaintiff contends *Starview* was not decided upon the

merits. Specifically, plaintiff argues the Supreme Court's dismissal was based upon a determination that the case was not justiciable.

This court is not persuaded by the plaintiff's argument. The plaintiff has not cited, nor has the court independently been able to locate, any decisions disregarding a dismissal for lack of a substantial federal question on the grounds that the dismissal may have been premised upon the lack of a justiciable controversy. The cases clearly state that such a dismissal is a decision on the merits. Appeals dismissed due to the absence of a justiciable controversy ordinarily specifically state that standing, ripeness or mootness was the reason for dismissal. *See e.g. Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company of Chicago,* — U.S. —, 103 S. Ct. 1762 (1983).

Plaintiff's reliance upon Justice Brennan's concurring decision in *Mandel* does not support its position to the contrary. In *Mandel,* Justice Brennan stated that before considering a dismissal for want of a substantial federal question as binding, a court must "determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground." [*Id.* at 180.] Plaintiff interprets the phrase "some alternative nonconstitutional ground" as including decisions "other than on the merits." The decisions previously cited, however, make clear that such is not the case. Rather, Justice Brennan is apparently referring to decisions resting upon alternative state law or other grounds. Aside from justiciability, plaintiffs fails to suggest what that alternative ground could have been

in the present case. Thus, the court rejects the defendants' contention that the case is not controlling because it was decided "other than on the merits."

Finally, plaintiff contends the Supreme Court's dismissal of the *Starview* appeal is not controlling because, in the present case, it has "mounted a substantial and detailed prior restraint attack upon the ordinance", while "[n]either the licensee nor the state's attorney made any sort of sophisticated analysis or presentation in *Starview* regarding the issue of prior restraint." In order to determine whether a particular issue was considered and necessarily rejected by the Supreme Court, a court must examine the jurisdictional statement from the appeal to that Court. [*Mandel*, 432 U.S. at 180 (Brennan concurring);] *Chicago Sheraton Corporation v. Zaban*, 593 F.2d 808, 809 (7th Cir.), *cert. dismissed*, 444 U.S. 911 (1979); *Stratton v. Drumm*, 445 F. Supp. 1305, 1309 (D. Conn. 1978).

In *Starview*, the appellant raised the issue of a prior restraint at several places in its jurisdictional statement. (Appellant's Jurisdictional Statement [. . .] 21-22). While the issue may not have been as artfully raised as it has been here, it was nevertheless brought before the court. Plaintiff again has not cited, nor has the court been able to locate, any decision disregarding a dismissal for want of a substantial federal question on the grounds that an issue presented and necessarily decided by the court was not introduced in a sophisticated manner.

It appears to the court that plaintiff's real argument in this regard involves a factual distinction between *Starview* and the present case. In *Starview*, the plaintiff had been issued a license, while in the present case no such license has been issued. As a result, in *Starview*, the plain-

tiff's license was only subject to revocation *after* the showing of a film allegedly violating the ordinance and *after* a hearing on the revocation. Here, arguably, plaintiff's refusal to enter into the subject covenant has completely prevented it from exhibiting films of any type.

The court is unpersuaded by this factal distinction. The issuance of a license under both the Cook County and Winnebago County ordinances is expressly premised upon the execution of a covenant. The action in *Starview* was for declaratory judgment based upon the *facial invalidity* of the statute. While the facts are distinguishable, the legal issues are identical. Thus, the fact that the plaintiff in *Starview* reluctantly executed the covenant while the plaintiff in the present case refused to do so is not material.[1]

Conclusion

It is not without some reluctance that the court concludes it is bound by the summary disposition in *Starview*. In the view of this court, substantial doubt remains concerning *Starview's* validity in light of *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).[2] While the

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[1] Such a distinction might be material to the issue of standing. As the court has already recognized, however, absent an express statement to the contrary, considerations of justicability do not play a role in decisions to dismiss an appeal for want of a substantial federal question.

[2] For conflicting state court decisions, *See* [sic *compare,*] *People v. Valley Cinemas, Inc.*, 194 Cal.Rptr. 859 (Cal.App.3rd Dist. 1983) and [sic *with*] *State v. Budco Quality Theaters, Inc.*, 155 N.J.Super. 50, 382 A.2d 192 [sic 102] (1977).

Supreme Court is free to disregard its summary actions, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981), [. . .] this court is not. Thus, for the reasons set forth herein, plaintiff's motion for a preliminary injunction is denied and defendants' motion to dissolve the temporary restraining order is granted.

ENTER:

/s/ Stanley J. Roszkowski
Stanley J. Roszkowski, Judge
United States District Court

Dated: June 7, 1984

EXHIBIT B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 17, 1985.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

Appeal from the United States District Court for
the Northern District of Illinois, Western Division.

84-C-20079
Stanley J. Roszkowski, *Judge*.

SOUTHLAND NEWS CO., INC., a Kentucky corporation, authorized to do business in the State of Illinois,

Plaintiff-Appellant,

No. 84-1988

vs.

THE COUNTY OF WINNEBAGO, a body politic, and PAUL GILL, in his capacity as Clerk of Winnebago County, Illinois,

Defendants-Appellees.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause on August 28, 1985, by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

EXHIBIT C

First Amendment Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

Fourteenth Amendment
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

WINNEBAGO COUNTY OUTDOOR
THEATER LICENSE ORDINANCE

STATE OF ILLINOIS,)
) ss.
County of Winnebago,)

I, PAUL P. GILL, County Clerk, within and for said County, and having a seal do hereby certify that I have compared the foregoing copy of the Record of Ordinance Amendment to the County Code of Ordinances, Article III, Section 4-14, concerning applications for licenses for outdoor theaters with the Original Record thereof now remaining in my office, and have found the same to be a correct transcript therefrom and of the whole of such Original Record.

In testimony whereof I have hereunto set my hand and affixed the seal of said County, at the City of Rockford, in said County, this 13th day of April A.D. 1984.

/s/ Paul P. Gill, Winnebago County Clerk

By: /s/ Jane Banter, Deputy County Clerk

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ORDINANCE AMENDMENT

WHEREAS, the County of Winnebago has previously enacted pursuant to Chapter 34, Section 421, Illinois Revised Statutes, regulations and licensing procedures for outdoor drive-in theaters, which regulations and licensing procedures are contained within Article III, Section 4-14 *et seq.* of the Code of Ordinances of the County of Winnebago; and

WHEREAS, it is in the best interest of the health, safety, morals and welfare of the residents of the County of Winnebago and the current and future residents of the County whose homes are in close proximity to existing or future outdoor drive-in theaters to amend the Code of Ordinances of the County of Winnebago.

NOW, THEREFORE, BE IT ORDAINED, by the County Board of the County of Winnebago that Article III, Section 4-14 be amended by deleting the language in its entirety and inserting in its stead the following language:

Section 4-14.

Every application for license or renewal thereof required by this Article shall be filed with the County Clerk supported or accompanied by:

a) The designated license fee;

b) Information as to the name and address of the applicant, theater seating and parking capacity, location of the theater to be licensed, and the name under which the applicant expects to conduct his business;

c) A written covenant by the applicant to refrain or desist from exhibiting any motion picture or film presentation viewable from any private residence or any public street or walkway which contains any scene or scenes depicting sexual intercourse, masturbation, oral copulation, erect male genitalia or male ejaculation;

d) A written covenant by the applicant to refrain or desist from exhibiting any motion picture or film presentation viewable from any private residence which contains any scene or scenes depicting the caressing or fondling of the bare female breast or bare male or female buttocks, anus or genitals.

BE IT FURTHER ORDAINED, that the covenant required in Paragraph 4-14(d) above shall be in a form substantially equivalent to that which is attached hereto and marked as Exhibit "A."

BE IT FURTHER ORDAINED, that this Ordinance Amendment shall be in full force and effect immediately upon its adoption.

BE IT FURTHER ORDAINED, that the Clerk of the County Board is hereby authorized to prepare and deliver certified copies of this Ordinance Amendment to Sheriff Donald Gasparini, County Board Chairman, State's Attorney Daniel D. Doyle, and the holders of currently valid outdoor drive-in theater licenses.

The above and foregoing Ordinance Amendment was adopted by the County Board of the County of Winnebago, Illinois, on the 12th day of April, 1984.

/s/ Pat L. Scott
Pat L. Scott, Chairman of the
County Board of the County of
Winnebago, Illinois

ATTEST:

/s/ Paul P. Gill
Paul P. Gill, Clerk of the
County Board of the County
of Winnebago, Illinois

WINNEBAGO COUNTY CODE

CHAPTER 4, "Amusements"

ARTICLE III. THEATRES

Section 4-13. License required; Fee; Duration.

It shall be unlawful for any person to establish, operate or maintain or permit to be established, operated or maintained upon any property owned or controlled by him, within the boundaries of the county, but outside the limits of cities, villages, and incorporated towns, a theatre in the business of providing entertainment consisting of either live shows or plays, outdoor or indoor motion pictures, without having first secured a license therefor from the County Clerk. Such license shall be valid and have force in the county until succeeding April 30 from the date of issue, and may be renewed under provisions of this Article for additional periods of one (1) year. The annual fees for such license shall be $75 for a live theatre, $50 per screen for an indoor movie theatre not to exceed

$200, and $75 per screen for an outdoor movie theatre not to exceed $200.

Short term licenses shall be available to all new licensees under this Article at a fee which is prorated in accordance with a full year rate.

Section 4-14. Same—Application.

The application for a license required by this Article or renewal thereof shall be filed with the County Clerk accompanied by the designated license fee. Application for license renewal thereof shall be made on printed forms furnished by the County Clerk and shall include the name and address of the applicant, theatre seating and parking capacity, location of the theatre to be licensed and the name under which the applicant expects to conduct his business.

Section 4-15. Same—Issuance.

Before any new license under this article may be issued there must be a favorable recommendation by a majority of the county board.

Section 4-16. Same—Suspension or revocation—Investigating commission.

The chairman of the county board, together with two other members of the board appointed by him shall constitute a commission to investigate and hear any complaints that may be made concerning violations of the provisions of this Article. The two members selected from the board to serve on such commission shall serve for a period of two years or until their successors have been appointed and duly qualified. Members of the commission may be reappointed.

Section 4-17. Same—Same—Proceedings, grounds, etc.

The commission created by the preceding section is authorized to revoke or suspend any license issued pursuant to the terms of this Article, if after this investigation and hearing the commission shall determine that the holder of such license has violated any of the provisions of this Article. No hearing shall be held unless notice of such hearing shall have been served by registered mail on the alleged violator at least three days prior to the date of the hearing. The commission shall keep a record of any proceedings taken at a hearing pursuant to this section. The commission may suspend a license issued pursuant to the terms of this Article for a period not to exceed thirty days, if it determines that the holder is guilty of a violation of any of the provisions of this Article.

Section 4-18. Theatre to be clean and order maintained.

It is hereby made the duty of the licensee under this Article to maintain the theatre in a safe, clean, orderly and sanitary condition at all times.

Section 4-19. Inspection.

All licensees under this Article shall be subject to the inspection by the County Building Officer and/or the County Health Officer or their deputies.

Section 4-20. Penalty.

Any person violating any provision of this Article shall be fined not exceeding two hundred dollars for each offense; and a separate offense shall be deemed com-

mitted on each day during or on which a violation occurs or continues.

Amendments to Ordinance approved by the Winnebago County Board on the 8th day of August, 1974.

4-10-75

COPIES OF THIS ARTICLE PREPARED AND FURNISHED BY:

/s/ Paul P. Gill
PAUL P. GILL,
WINNEBAGO COUNTY CLERK

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION
ROCKFORD, ILLINOIS

No. 84 C 20079

SOUTHLAND NEWS CO., INC., a Kentucky corporation, authorized to do business in the State of Illinois,

Plaintiff,

vs.

THE COUNTY OF WINNEBAGO, a body politic, PAUL GILL, in his capacity as County Clerk of Winnebago County, Illinois,

Defendants.

TEMPORARY RESTRAINING ORDER

(Filed May 3, 1984)

Southland News Co., Inc., (Southland'') has filed this action seeking declaratory, injunctive and money damage relief against the County of Winnebago (''Winnebago County''), and Winnebago County Clerk Paul Gill (''Gill''). Southland's complaint focuses on the validity of a Winnebago County ordinance that provides for the licensing of outdoor or drive-in theaters and, as recently amended April 12, 1984, requires the execution of covenants by a potential licensee that movies containing certain types of sexual scenes or depictions will not be exhibited (the ordinance, as so amended, is referred to as the ''Ordinance''). This Court is now ruling on Southland's request for a temporary restraining order, (''TRO'') to enjoin and prohibit defendants from enforcing the Ordinance against Southland, after its ap-

plications for theater license for the Sunset Drive-in Theater and the Robin Drive-in Theater were denied and refused because Southland would not execute the covenants in compliance with the Ordinance. Current licenses for these theaters held by Southland expire April 30, 1984.

At the April 30, 1984 TRO hearing, counsel for Southland and defendants appeared by written notice and agreement. The court has received and considered the following evidence for purposes of Southland's motion for a TRO:

1. Southland's verified Complaint including its exhibits: Exhibit A, the Ordinance; Exhibits B and C, the license applications for the Sunset and Robin Theaters, respectively; and Exhibit D, correspondence from Southland's attorney to defendants' attorney as to the anticipated enforcement of the Ordinance and its claimed constitutional invalidity;

2. Affidavit of Edward C. Schuerman, a booker employed by Kerasotes Theatres, Inc. ("Kerasotes") as to (a) the nature of motion picture films shown under the Motion Picture Association of America rating system and (b) questions of interpretation regarding the Ordinance as applicable to the Belford Theater operated by Kerasotes;

3. Southland's Memorandum in Support of Plaintiff's Complaint for Declaratory, Injunctive and Money Damage Relief, with attached copies of authorities;

4. Defendants' Motion To Dismiss Motion for Temporary Restraining Order, together with a Memorandum in support thereof, and attached copies of authority, including *People v. Starview Drive-in Theatre*, 100 Ill.App.

3d 624, 427 N.E.2d 201 (1st Dist. 1981), appeal dismissed 102 S.Ct. 2918 (1982); and

5. Testimony of Norm Nelson, Kerasotes' city manager, as to Kerasotes' failure to apply for a renewal license for the Belford Theater in Winnebago County because the theater has two outdoor screens and Kerasotes has concerns about the interpretation and applicability of the covenant requirements of the Ordinance, especially as contained in Ordinance § 4-14(d).

Based on a review of the foregoing matters, this Court sets forth the following findings of fact ("Findings") and conclusions of law ("Conclusions") that constitute the grounds of its action in issuing this TRO, in accordance with the Federal Rules of Civil Procedure ("Rules") 52(a) and 65(d):

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 1343.

2. All parties have appeared by notice and agreement.

3. Southland has met its burden of proof in its presentation of evidence at the hearing for a TRO, and there is reasonable basis to believe and conclude in fact and law that:

(a) Under *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the United States Supreme Court has spoken directly on the subject of restrictions on First Amendment activity contained in outdoor theater regulations. There the court held restraints invalid in constitutional terms under the First Amendment because they were content-related.

(b) *People ex rel. Carey v. Starview Drive-in Theater*, 100 Ill.App.3d 624, 427 N.E.2d 201 (1981), must be read in the context in which it was decided. There the licensee had applied for and received a license and was operating. It thus had the opportunity to launch an attack on the Ordinance in question only from the inside looking out, as opposed to doing so from the outside looking in. Neither party in *Starview* defined "prior restraint" in that context or undertook a significant prior restraint analysis of the ordinance reviewed by the court in that case.

(c) Even though the Supreme Court's dismissal of the appeal in *Starview* is to be viewed as a decision on the merits (see *Hicks v. Miranda*, 422 U.S. 332 (1975), because of the limitations of the *Starview* decision, this Court finds *Erznoznik* controlling. It finds and concludes Southland has established a reasonable likelihood of success on the merits that the Ordinance offends the Fourteenth Amendment to the Constitution of the United States (which applies the First Amendment to the States), because the Ordinance impermissibly places restrictions upon the exhibition of motion picture films presumptively protected under the First Amendment (via the Fourteenth).

4. Southland has no adequate remedy at law. Its business consists of the exhibition of motion pacture films presumptively protected by the First Amendment. Here the showing is that Southland's theaters will be precluded not only by the lapse of licenses and not only by an inability to show motion pictures as described in the ordinance, but also a prohibition from showing any motion

pictures at all because it has no licenses. This alone establishes irreparable harm.

5. Southland's harm if a TRO is wrongfully denied is far greater than any potential harm to the County of Winnebago and Gill if the TRO were wrongfully granted. Upon issuance of a TRO defendants are left with precisely the opportunity identified by the *Starview* case, that of prosecuting any motion picture not protected by the First Amendment. Moreover, of course, a TRO by its very terms has a limited life.

6. There is no disservice to the public, and indeed the public interest is advanced, by the preservation, and protection of Southland's First Amendment rights.

IT IS THEREFORE ORDERED that the defendant Winnebago County and Gill shall be prohibited and enjoined from enforcing the provisions of Ordinance § 4-13 et seq. until May 12, 1984, at 6:30 p.m. (that time period has been extended an additional two days by agreement of the parties). This action is set for further hearing May 11, 1984 at 10:00 a.m. for purposes of Southland's request for a preliminary injunction. In accordance with defendants' agreement, the requirement of bond under Rule 65(c) is waived.

/s/ Milton I. Shadur
Milton I. Shadur
United States District Judge

This TRO was issued April 30, 1984 at 6:30 p.m.